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IN THE

Supreme Court of the United States

October Term, 1965

No. 1285

GLASSMAN CONSTRUCTION CO., INC.,

Petitioner,

v.

THE FIDELITY AND CASUALTY CO. OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Glassman Construction Co., Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on January 6, 1966.

OPINIONS BELOW

The United States District Court for the District of Columbia entered an Order for Summary Judgment and Judgments on June 15, 1964. A copy of that Order is appended hereto as Appendix A. The United States Court of Appeals for the District of Columbia Circuit rendered judgment and delivered its opinion on January 6, 1966. A copy of that opinion is appended hereto as Appendix B and is reported in ___ U.S. App. D.C. ___, 356 F.2d 340 (D.C. Cir. 1966).

JURISDICTION

The jurisdiction of the United States District Court for the District of Columbia was based upon Title 11, Section 301, *et seq.*, of the District of Columbia Code (1961 Ed.), and Title 28, U.S.C., Section 1331 *et seq.* The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit was based upon Title 28, U.S.C., Section 1291. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254. Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that Court entered on January 6, 1966. On March 21, 1966, this Court granted Petitioner's application for an extension of time within which to file petition for writ of certiorari, extending such time from April 6, 1966, to and including May 5, 1966.

QUESTION PRESENTED

Whether a United States Court of Appeals may, consistent with its proper judicial function, order the production of evidence, weigh and consider such evidence, make findings of fact therefrom, and on the

basis of such findings affirm a grant of summary judgment made by a United States District Court on cross-motions for summary judgment; and whether a United States Court of Appeals may enter judgment based upon its own findings of fact unsupported by the record.

STATEMENT

On April 28, 1959, one J. C. Harman (hereinafter referred to as "Harman"), an electrical contractor, entered into a *General Contract of Indemnity* with the Respondent, The Fidelity and Casualty Company of New York, (hereinafter referred to as "Fidelity"), a surety bonding company, whereby Harman, as principal, assigned to Fidelity, as surety, all rights to collect and receive all monies due or to become due to Harman on contracts entered into between Harman and others under which Fidelity, as surety, had issued or would thereafter issue payment and/or performance surety bonds.

On December 14, 1959, Petitioner, Glassman Construction Co., Inc., (hereinafter referred to as "Glassman"), entered into two subcontracts with Harman, whereby Harman was to perform the electrical work on two school construction projects in the State of Virginia for which Glassman was prime contractor. The two subcontracts also provided that Glassman could withhold as contract retainages, a portion of the consideration due Harman under such subcontracts.

On December 15, 1959, pursuant to the *General Contract of Indemnity* dated April 28, 1959, referred to hereinabove, Harman and Fidelity executed two labor and material bonds covering Harman's obligations to suppliers of labor and materials on the two subcontracts of December 14, 1959.

On July 19, 1960, Glassman entered into a third subcontract with Harman, whereby Harman was to perform the electrical work on another school construction project for which Glassman was prime contractor, and which was unrelated to the two projects which were the subject of the two subcontracts of December 14, 1959. Fidelity was not the surety on this third subcontract.

On November 30, 1960, Harman defaulted on all three subcontracts. The cost to Glassman to complete Harman's work on the third subcontract of July 19, 1960, exceeded the amount of retainages held by Glassman under the two subcontracts of December 14, 1959.

Fidelity brought suit against Glassman in the United States District Court for the District of Columbia to recover the retainages on the two contracts of December 14, 1959, principally on the theory that it was the assignee of Harman's rights to such retainages. Glassman asserted against Fidelity its right to set-off as against such retainages the excess costs incurred by it in completing Harman's obligations on the third subcontract of July 19, 1960.

The matter came before the United States District Court on cross-motions for summary judgment. There being no material facts in dispute, Glassman's motion for summary judgment was denied and Fidelity's motion for summary judgment was granted on June 15, 1964. Glassman appealed to the United States Court of Appeals for the District of Columbia Circuit.

By Order dated September 3, 1965, a copy of which is appended hereto as Appendix C, entered *after* oral argument of the appeal, the United States Court of

Appeals directed the parties to file briefs as to the applicability to the case of the general rule of law that, when, in a suit on a chose in action brought by the assignee thereof, the debtor pleads as a set-off thereto a claim against the assignor, such set-off will not be allowed if it appears that before he acquired the claim the debtor had notice of the assignment or had knowledge of such facts as were sufficient to have put him upon inquiry as to it. See, *Restatement, Contracts*, Section 167(1) (1932), and 16 *Michie's Jurisprudence of Virginia and West Virginia* 423 (1959).

The United States Court of Appeals stated in its Order:

> "If such principle should be applicable, the disposition of this case may turn on certain facts not appearing in the record as presently constituted. These facts are the following:
>
> * * * * * *
>
> (3) The date on which Glassman Construction Company received notice, either actual or constructive, of the assignment provisions contained in Paragraph No. 13 of the General Contract of Indemnity entered between appellee, Fidelity and Casualty Company of New York, and J. C. Harman on April 28, 1959." (Order dated September 23, 1965. Page 1.)

and directed the parties to indicate in their briefs whether such date was controverted by the parties. (Order dated September 23, 1965. Page 2.)

Upon the filing of supplemental briefs and replies thereto by both parties, excerpts of which are appended hereto as Appendix D, it became evident that there *was* a serious dispute as to whether, at the time

that Glassman's right to set-off arose against Harman on the third subcontract of July 19, 1960, Glassman had notice of Harman's assignment to Fidelity of the proceeds due under the two subcontracts of December 14, 1959. If Glassman had such notice, its right to set-off against Fidelity would have been defeated.

Despite the presence of a dispute as to a material fact which the parties had not theretofore considered, and which had not been a subject of discussion in the District Court, the United States Court of Appeals in its opinion of January 6, 1966, made findings of fact that:

> "The issuance of the bonds was notice to Glassman of the assignment of Harman's rights to Fidelity." (356 F.2d 340, 343)

and this because:

> "Virginia law required the bonds, Glassman's contract with Harman required the bonds, Glassman received copies of the bonds at the time they were issued and indeed was an obligee thereon." (356 F.2d 340, 343)

Such finding was totally unsupported by the record and was contrary to fact. The issuance of the bonds was not notice to Glassman of the assignment since the bonds neither contained any language of assignment nor referred to the only place where such language was present, the *General Contract of Indemnity* executed on April 28, 1959, eight (8) months prior to issuance of the bonds on December 15, 1959. Nor did the fact that Virginia law required the bonds give notice to Glassman. The applicable Virginia statute, 3 Code of Virginia Section 11-23 (1964), contains no language that would put a contractor in Glassman's position on notice that his subcontractor had assigned contract proceeds to a surety.

The Court made the further finding that:

> "Harman *in return* [for Fidelity's execution of bonds for the two subcontracts of December 14, 1959] assigned to Fidelity his rights to collect and receive all moneys due and to become due on these two subcontracts." (356 F.2d 340, 343) (Emphasis added.)

This finding was also unsupported by the record and contrary to fact. It is unthinkable to assert that an assignment made on April 28, 1959, is given *in return* for the execution of bonds on December 15, 1959, eight (8) months later.

As a result of such findings of fact, and in disregard of the presence of a dispute as to a material fact, and despite its own recognition that ". . . Glassman now contends it had no notice of the assignment . . . ." (356 F.2d 340, 343), the United States Court of Appeals affirmed the District Court's grant of summary judgment for Fidelity.

REASONS FOR GRANTING THE WRIT

I

It seems well established that a United States Court of Appeals in reviewing a decision of a United States District Court in an action at law may not receive and weigh evidence and make findings of fact therefrom. *Slip Scarf Co. v. Wm. Filene's Sons Co.*, 289 F. 641 (1st Cir. 1923); *United States ex rel. McClellan v. Humphrey*, 181 F.2d 757 (3d Cir. 1950); *Cash v. Murphy*, 339 F.2d 757 (5th Cir. 1964).

The case of *Carr v. Corning*, 86 U.S. App. D.C. 173, 182 F.2d 14 (D.C. Cir. 1950), is precise in its holding that where review by a United States Court of Appeals

is limited to the propriety of an entry of summary judgment in the District Court:

> "An appellate court cannot be the trier of facts, and particularly it cannot decide a question of fact upon evidence which is not in the record. We cannot make findings of fact different from the allegations of the pleadings and affidavits upon which summary judgment or dismissal was entered below . . . ." (182 F.2d 14, 21)

Nor will a Court of Appeals, "[D]raw conclusions by speculation where the data necessary for certainty was not given in the trial court." *Riley v. Titus*, 89 U.S. App. D.C. 79, 190 F.2d 653, 655-56 (D.C. Cir. 1951), *certiorari denied*, 342 U.S. 855, *rehearing denied*, 342 U.S. 889 (1951), or seek to adjudicate disputed facts, *Hycon Manufacturing Co. v. Koch & Sons*, 219 F.2d 353 (9th Cir. 1955), *certiorari denied*, 349 U.S. 953 (1955), or, "[R]everse a summary judgment on the basis of arguments and facts not presented to the District Court." *River Plate and Brazil Conferences v. Pressed Steel Car Co.*, 227 F.2d 60, 63 (2d Cir. 1955).

See generally, *Proctor v. Sangamore Big Game Club*, 265 F.2d 196 (3d Cir. 1959), *certiorari denied*, 361 U.S. 831 (1959), and *Shafer v. Reo Motors, Inc.*, 205 F.2d 685 (3d Cir. 1953).

In *Lloyd v. Franklin Life Ins. Co.*, 245 F.2d 896 (9th Cir. 1957), where summary judgment had been entered on cross motions for summary judgment and a motion to vacate the judgment was made thereafter on the basis of unresolved material questions of fact, the Court of Appeals said:

> "If this Court on appeal had found that proposition [that there were unresolved material ques-

> tions of fact] true, the cause must have been reversed, irrespective of the fact that each of the contesting parties respectively filed a motion for summary judgment." (245 F.2d 896, 897)

This Court has spoken on one aspect of the question presented in *Securities and Exchange Comm. v. Chenery Corp.*, 318 U.S. 80 (1943), wherein MR. JUSTICE FRANKFURTER stated that:

> "[I]t is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make, but which has not been made, the appellate court cannot take the place of the jury." (318 U.S. 80, 88)

While the cases cited above may have served to establish the general limitations upon the United States Courts of Appeal in their judicial review of factual matters, none was concerned with the Court itself calling for the production of evidence.

The action of the Court of Appeals in calling for the production of evidence and in making clearly erroneous findings therefrom is not only prejudicial to this Petitioner, but if left uncorrected, will establish a precedent that greatly expands the permissible and traditional scope of judicial review by the United States Courts of Appeal, constituting them as triers of facts which the parties intentionally or inadvertently left unconsidered in the District Courts. Petitioner believes that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so greatly exceeded the proper scope of its judicial function as to call for an exercise of this Court's power of supervision over the lower Federal tribunals.

II

While the decision of this Court in *Securities and Exchange Comm. v. Chenery Corp.*, 318 U.S. 80 (1943), set forth the rule that an appellate court may not make a finding of fact ". . . which only a jury could make, but which has not been made . . . ." 318 U.S. 80, 88, which rule would, by analogy, extend to findings made by a trial court sitting without a jury, this Court has not set forth or clearly defined the fact-finding power of a United States Court of Appeals where the case is on appeal from a judgment rendered on cross-motions for summary judgment. Petitioner believes that this Court should set forth the proper procedure to be followed in such circumstances.

III

To the extent that the decision of the United States Court of Appeals for the Ninth Circuit in *Lloyd v. Franklin Life Ins. Co.*, 245 F.2d 896 (9th Cir. 1957), a portion of which has been quoted hereinabove, has not been adhered to in the instant case by the United States Court of Appeals for the District of Columbia Circuit, there is a conflict between the circuits, the presence of which forms a basis for review by this Court.

CONCLUSION

For the reasons set forth hereinabove, Petitioner prays this Court grant this petition for writ of certiorari.

Respectfully submitted,

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Washington, D. C.
Counsel for Petitioner

CERTIFICATE OF SERVICE

Leonard S. Melrod and Joseph V. Gartlan, Jr., 815 Connecticut Avenue, N.W., Washington, D.C., Counsel for Petitioner, hereby certify that copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, and Appendices thereto, were hand carried and delivered to Thomas H. McGrail, 505 Union Trust Building, Washington, D.C., Counsel for Respondent, this 5th day of May, 1966.

LEONARD S. MELROD
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APPENDIX A

[Filed June 15, 1964]

ORDER FOR SUMMARY JUDGMENT AND JUDGMENTS

This matter having come before the Court on cross motions for summary judgment by the parties, and the parties agreeing that there are no material facts in dispute, and the issues of law having been briefed and submitted to the Court by the parties, full argument by counsel for the parties having been heard by the Court, and the Court having considered the matter fully, it is this 15th day of June, 1964,

ORDERED, that defendant's motion for summary judgment is denied and plaintiff's motion for summary judgment is granted, and it is further

ORDERED, ADJUDGED AND DECREED, That plaintiff recover from defendant on the Whittier project the sum of Four Thousand Six Hundred and Fifty-seven Dollars and Nineteen Cents ($4,657.19) ~~plus interest at six percent (6%) per annum from December 7, 1961~~, and recover from defendant on the Washington Irving project the additional sum of Nine Hundred and Fourteen Dollars and Fifty Cents ($914.50) and its costs of this action.

/s/ G. L. Hart, Jr.
Judge

[Certificate of Service]

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,850

GLASSMAN CONSTRUCTION CO., INC., APPELLANT

v.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, APPELLEE

No. 18,853

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, APPELLANT

v.

GLASSMAN CONSTRUCTION CO., INC., APPELLEE

Appeals from the United States District Court for the District of Columbia

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Decided January 6, 1966

Mr. Leonard S. Melrod, with whom *Mr. Joseph V. Gartlan, Jr.* was on the brief, for appellant in No. 18,850 and appellee in No. 18,853.

Mr. Thomas H. McGrail for appellee in No. 18,850 and appellant in No. 18,853.

Before BURGER, WRIGHT and MCGOWAN, *Circuit Judges.*

WRIGHT, *Circuit Judge:* Appellant Glassman Construction Company was the prime contractor on three contracts with the School Board of Fairfax County, Virginia, for construction of three schools in that county. It entered into subcontracts with one J. C. Harman for performance of the electrical work on each of the three jobs. Subsequently Harman entered into an agreement with appellee Fidelity & Casualty Company of New York, pursuant to which Fidelity executed payment bonds covering Harman's obligations to the suppliers of labor and materials on two of the above mentioned subcontracts. Harman in return assigned to Fidelity his rights to collect and receive all moneys due and to become due on these two subcontracts. Fidelity was not the surety on the third subcontract.

After Harman failed to pay some of the materialmen on the two jobs bonded by Fidelity, Fidelity paid them pursuant to its obligation under the bonds. Harman also defaulted on the third subcontract and Glassman completed the work, incurring costs substantially in excess of the contract price. It is agreed by the parties that the excess costs on this third job exceeded the retainages on the two subcontracts on which Fidelity was surety.

Fidelity filed a complaint in the District Court against Glassman claiming the retainages on the two subcontracts it bonded. Glassman defended on the ground that it was entitled to set off against these retainages the excess costs it incurred in completing Harman's work on the third job. On cross-motions for summary judgment, the District Court entered judgment for Fidelity in the amount of $5,571.69, but denied Fidelity's request for interest from December 7, 1961, the date on which the subcontracts became due and payable. Glassman limits its appeal to

the issue of liability and Fidelity cross-appeals for interest. We affirm the District Court.

Fidelity's claim to the retainages on the subcontracts it bonded is based on three independent grounds. Primarily, it seeks to establish itself as an assignee of the rights of Harman. Glassman opposes recovery on this ground, citing *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), for the principle that an assignee's claim to a fund is subject to any right of set-off the stakeholder may have against the assignor. Fidelity, while admitting that *Munsey Trust* so holds, would limit *Munsey Trust* to its facts—where the United States is the stakeholder with the set-off claim.

Fidelity's second approach to recovery, designed to avoid Glassman's set-off claim, is as assignee of the rights of the materialmen whose claims it satisfied. Its title to these rights, it argues, is clear on two bases. First, it obtained the materialmen's rights by formal assignment at the time it paid the materialmen's claims, and second, under the traditional theory of subrogation the "surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed." *Pearlman* v. *Reliance Insurance Co.*, 371 U.S. 132, 137 (1962).

Fidelity's third ground for recovery, and second basis for avoiding the set-off claim, is predicated on *Prairie State Bank* v. *United States*, 164 U.S. 227 (1896). In that case the Supreme Court recognized the surety as the subrogee of the party protected by the bond against the claims of materialmen. Thus here, since Glassman was an obligee on the bonds, Fidelity would succeed to Glassman's right to use the retainages to satisfy the claims of materialmen.

Although there is much support in *Pearlman* and *Prairie State Bank* for Fidelity's position, the fact remains that in neither was the stakeholder asserting the cross-claim.

Moreover, the broad language[1] in *Munsey Trust*, where, as here, the stakeholder was asserting the cross-claim, would seem to cover the present case. Fortunately, we need not penetrate the confusion created by the apparent inconsistencies in *Pearlman*, *Prairie State Bank* and *Munsey Trust*. Here Glassman's right to set-off against Harman did not arise until after it received notice of the assignment of Harman's rights under the subcontracts to Fidelity. Thus the set-off is ineffective against the assignment.

The law in Virginia,[2] as it does generally,[3] clearly recognizes that an assignee "takes the assignment subject to all defenses of the obligor against the assignor, or pledgor, existing before notice of assignment." *Hartford Fire Ins. Co.* v. *Mutual Savings & Loan Co.*, 193 Va. 269, ——, 68 S.E.2d 541, 546 (1952). See also *National Bank & Trust*

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[1] In *Munsey Trust*, the Court stated that the United States has the right, " 'which belongs to every creditor, to apply the unappropriated money of his debtor, in his hands, in extinguishment of the debts due to him.' " 332 U.S. at 239.

[2] The parties are agreed that the law of Virginia, where the contract was performed, applies.

[3] The general rule, as stated in the Restatement of Contracts, is that "[a]n assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment, or are based on facts arising thereafter prior to knowledge of the assignment by the obligor." RESTATEMENT, CONTRACTS § 167(1) (1932). Corbin states that "[i]n no jurisdiction is the counterclaim or set-off effective against the assignee if it was acquired by the obligor after notice of the assignment." 4 CORBIN, CONTRACTS § 897, pp. 600-601 (1951). See also UNIFORM COMMERCIAL CODE § 9-318(1) (1962), and comment thereto.

Company v. *Castle*, 196 Va. 686, 85 S.E.2d 228 (1955), and 16 MICHIE, JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA § 13, p. 423 (1951). This aspect of the case turns, therefore, on whether Glassman's right to set-off under the third subcontract arose prior to notice to it of the assignment to Fidelity under the first two.

The facts here show that the Harman subcontracts bonded by Fidelity were entered into December 14, 1959, that Fidelity, as surety for Harman, executed the payment bonds covering the two subcontracts on the following day, December 15, 1959, that Glassman's third subcontract with Harman, not bonded by Fidelity, was entered into on July 19, 1960, and that the default on all three subcontracts occurred on November 30, 1960. These facts present for our resolution two questions: (a) when did the assignment become effective, and (b) when did Glassman receive notice thereof.

As to the time the assignment in surety contracts becomes effective, there seems to be a division of authority.[4] And the State of Virginia, whose law we apply,[5] provides no guidance.[6] We must predict, therefore, the position of the court of last resort in that state were the

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[4] See cases cited in Judge Magruder's excellent opinion in *Gray* v. *Travelers Indemnity Company*, 9 Cir., 280 F.2d 549, 554 (1960).

[5] In determining priority to proceeds of construction contracts, we apply the law of the place of performance for the reason that the same law governs other questions of performance. See RESTATEMENT, CONFLICT OF LAWS § 354 (1934).

[6] The decision in *American Surety Co.* v. *Plank & Whitsett*, 159 Va. 1, 165 S.E. 660 (1932), cited and relied on by Fidelity, while involving priority to proceeds on construction contracts, is based on fraud and thus furnishes an uncertain precedent.

problem presented to it for resolution.[7] We find that Virginia would follow the better reasoned cases,[8] including our own,[9] in holding that the assignment in a payment and performance bond is effective from the date of its execution. While the right actually to receive the retainages is subject to a condition precedent, when that condition is met, an equitable right to the funds withheld arises "from and relate[s] back to the date of the original contract of suretyship." *Morgenthau* v. *Fidelity & Deposit Co. of Maryland, supra* Note 9, 68 App.D.C. at 166, 94 F.2d at 635. See 4 CORBIN, CONTRACTS § 875.

The issuance of the bonds was notice to Glassman of the assignment of Harman's rights to Fidelity. Virginia

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[7] "In ascertaining what the state law is, the federal court must make use of all available data. Thus, in the absence of state decisions in point the court may look to the Restatement of the Law, to treatises and law review writing, and may, where appropriate, assume that the state will follow the majority rule." 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 8 (Wright ed. 1960, Supp. 1964). See also *President and Directors of Georgetown College* v. *Hughes*, 76 U.S.App.D.C. 123, 125, 130 F.2d 810, 812 (1942), and Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 NW. U. L. REV. 419, 423-427 (1960).

[8] See *Gray* v. *Travelers Indemnity Company, supra* Note 4. See also *Insurance Inc.* v. *United States Fidelity and Guaranty Co.*, 9 Cir., 323 F.2d 513, 516 (1963), and *Danais* v. *M. DeMatteo Const. Co.*, D.N.H., 102 F.Supp. 874, 877 (1952). See also 4 CORBIN, CONTRACTS § 897.

[9] See *Morgenthau* v. *Fidelity & Deposit Co. of Maryland*, 68 App.D.C. 163, 166, 94 F.2d 632, 635 (1937); *Moran* v. *Guardian Casualty Co.*, 64 App.D.C. 188, 189, 76 F.2d 438, 439 (1935); *Philadelphia Nat. Bank* v. *McKinlay*, 63 App. D.C. 296, 72 F.2d 89 (1934); *National Surety Company* v. *Lane*, 45 App.D.C. 176 (1916); *Lyttle* v. *National Surety Co.*, 43 App.D.C. 136 (1915).

law required the bonds,[10] Glassman's contracts with Harman required the bonds, Glassman received copies of the bonds at the time they were issued and indeed was an obligee thereon. Even without considering the general practice in the industry, it is clear from these facts that Glassman had notice of the assignment.[11] Moreover, subrogation as a matter of law resulted on the payment of the bonds, and relates back to the time of issuance; notice to Glassman, of course, is presumed therefrom.[12]

Although Glassman now contends it had no notice of the assignment, its primary argument in support of its set-off claim is that the assignment did not take effect until the default of Harman and, since Harman defaulted on all three subcontracts on the same day, its set-off was effective against the assignment. The case, relied on by Glassman, which supports the thesis that an assignment in these circumstances is not effective until default of the assignor is *Guarantee Co. of North America* v. *Tandy & Allen Construction Co.*, 76 N.J.Super. 274, 184 A.2d 426 (1962). *Tandy & Allen* held that, although the assignment was effective on the date the surety bond was executed, it was conditioned upon a breach of contract by the subcontractor, and that, since the breach deprived the subcontractor of the right to the retainages on his contract, no right thereto passed by assignment to the surety on the bond.

With due respect, the reasoning of *Tandy & Allen* will not bear analysis. It recognizes the assignment but denies

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[10] 3 CODE OF VIRGINIA § 11-23 (1964).

[11] Relying on two letters from Fidelity formally asserting its rights under the bonds, Glassman, in its supplemental brief, argues that it had no notice of the assignment until after the default by Harman. For the reasons stated in text, this argument is untenable.

[12] See authorities cited *supra* Note 8.

the surety the benefit thereof by delaying its effectiveness until after the subcontractor has defaulted and forfeited his contract rights. Thus *Tandy & Allen* "permits the [prime contractor] to enjoy its security and at the same time deprive the surety of the security without which the [prime contractor's] security would never have existed. • • • In [*Tandy & Allen*], the decision empowered the [prime contractor] to compel the surety assignee to carry the risk of the assignor's nonperformance of other contracts as well as of his nonperformance of the contract for which the bond was executed." 4 CORBIN, CONTRACTS § 897 n.29 (Supp. 1964).

Fidelity's demand for interest from December 7, 1961, the date on which the subcontracts became due and payable, was properly denied by the District Court. Under the appropriate statute, plaintiff's judgment "shall include interest on the principal debt from the time when it was due and payable" if interest is required "by contract or by law or usage." 28 D. C. CODE § 2707 (1961). Citing *Kenny Construction Company* v. *District of Columbia,* 105 U.S. App.D.C. 8, 262 F.2d 926 (1959), Fidelity claims law and usage entitle it to interest. In *Kenny Construction Company* interest was allowed, not on retainages, but on funds improperly withheld from the contractor. Thus *Kenny* provides no authority for the payment of interest on retainages. Since the contract between Glassman and Harman does not provide for interest on retainages, no basis is shown for allowing it.

Affirmed.

APPENDIX C

[Filed Sep. 3, 1965]

Before: BURGER, WRIGHT and McGOWAN, Circuit Judges.

ORDER

This case came on to be heard on appeal from summary judgment entered in favor of appellee, Fidelity and Casualty Company of New York, in the United States District Court for the District of Columbia, and was argued by counsel.

It appears to the court that the principle stated in *Restatement, Contracts* § 167(1) (1932), governing the relative priorities between an assignee of a claim, on the one hand, and the obligor, who seeks to set off the claim against a claim which he holds against the assignor, on the other, may be applicable to this case. See 16 *Michie, Jurisprudence of Virginia and West Virginia* 423 (1951). If such principle should be applicable, the disposition of this case may turn on certain facts not appearing in the record as presently constituted. These facts are the following:

(1) The date on which J. C. Harmon entered into the subcontract with appellant, Glassman Construction Company, Inc., for the Ellen Glasgow School Projects;

(2) The date on which the said Harmon defaulted on this subcontract;

(3) The date on which Glassman Construction Company received notice, either actual or constructive, of the assignment provisions contained in Paragraph No. 13 of the General

Contract of Indemnity entered between appellee, Fidelity and Casualty Company of New York, and J. C. Harmon on April 28, 1959.

It is therefore ORDERED by the court that the parties herein, on or before September 30, 1965, file briefs directed to the following matters:

1. Is the aforementioned principle applicable to the facts in this case?

2. Are any of the dates referred to in (1), (2), and (3) above controverted by the parties to this appeal?

Reply briefs, if any, may be filed on or before October 11, 1965.

Per Curiam.

Dated: Sep. 3, 1965

APPENDIX D

Excerpts from Briefs filed pursuant to Per Curiam Order entered September 3, 1965, by the United States Court of Appeals for the District of Columbia Circuit.

(a) Supplemental Brief for Appellant [Glassman]

> "As shown in the agreement between the parties in response to question #2 propounded by the Court (*infra*, pages 4-6), Appellant did not have notice, either actual or constructive, of the assignment between Appellee and Harman until after the default by Harman on the Ellen Glasgow School subcontract. Thus, under the foregoing, principal cited by the Court in its order of September 3, 1965, Appellant should be permitted to set-off as against Appellee, the former's claim against J. C. Harman, Appellee's assignor." [Page 3]

(b) Supplemental Brief for Appellee [Fidelity]

> "Glassman had actual or constructive knowledge of the assignment, prior to the time his set-off arose and indeed prior to Harman's actual default and this is so as a matter of law." [Page 9]

> "The only 'notice' to Glassman of any pertinence is notice of the issuance of the bonds. The fact of that notice is obvious." [Page 10]

(c) Appellant's [Glassman's] Reply to Appellee's [Fidelity's] Supplemental Brief

> "Appellee also states that because its general indemnity agreement with Harman preceded Harman's default on the Ellen Glasgow School job, Appellant had notice of the assignment

provision contained therein. However, Appellant had no knowledge, either constructive or actual, of the existence of this general indemnity agreement until long after Harman's default on the Ellen Glasgow job. As the agreement between Appellant and Appellee expressly shows, Appellee admits that Appellant did not have notice, either actual or constructive, of the assignment between Appellee and Harman until after the default by Harman on the Ellen Glasgow School subcontract." [Page 2]

(d) Reply of Appellee [Fidelity] to Supplemental Brief for Appellant [Glassman]

"For reasons set forth in Appellee's Supplemental Brief, Appellant Glassman had actual and constructive notice of the assignment to this Appellee prior to November 30, 1960, ..." [Page 4]

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IN THE

Supreme Court of the United States

No. 1285

GLASSMAN CONSTRUCTION CO., INC.,

Petitioner

v.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Filed May 27, 1966

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CASE:

Glassman Construction Co., Inc. v. The Fidelity and Casualty Company of New York, 356 F.2d 340 (D.C. Cir. 1966) 3, 6, 7

STATUTE:

3 Code of Virginia, Title 11, § 23 (1964 ed.) 2

MISCELLANEOUS:

2 Pomeroy's Equity Jurisprudence, 5th ed., § 604 8

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, The Fidelity and Casualty Company of New York, requests that the Petition for a Writ of Certiorari be denied.

QUESTIONS PRESENTED

1. Whether the determination to which petitioner objects constitutes a conclusion of law rather than findings of fact.

2. Whether the appellate court only inquired as to the existence of controversy over certain dates or whether

it ordered the production of evidence, considered such evidence and made findings of fact thereon and, in any event, is petitioner estopped from objecting in view of its stipulation and its acquiescence to the procedure objected to.

STATEMENT

On December 14, 1959, petitioner Glassman entered into two subcontracts with J. C. Harman whereby Harman became the electrical subcontractor to petitioner on two school construction projects for which petitioner was prime contractor for an instrumentality of the Commonwealth of Virginia.

On December 15, 1959, respondent surety issued labor and material bonds with Harman as principal and petitioner as obligee covering Harman's obligations to laborers and materialmen on the two subcontracts. Said bonds were obtained by Harman in accordance with the requirements of state law (3 Code of Virginia, Title 11, § 23 (1964 ed.)) and, as well, the subcontract terms, and were issued by respondent under a General Contract of Indemnity executed by Harman under date of April 28, 1959.

Seven months later, on July 19, 1960, petitioner entered into a third electrical subcontract with Harman on a third school project in Virginia. Respondent was not the surety on that subcontract.

Harman defaulted on all three subcontracts on November 30, 1960, and filed a petition in bankruptcy on December 1, 1960.

Petitioner holds subcontract retainages on the two projects bonded by respondent, after setting off all its losses arising from Harman's default on those projects. In respect to the third subcontract (not bonded by respondent) petitioner suffered losses by Harman's default, which losses it seeks to set off against the available retainages

on the first two subcontracts. Respondent surety seeks the same retainages to reimburse it for its payments under the bonds pertaining to said subcontracts.

Respondent surety brought suit against petitioner to recover the available retainages on the projects it bonded. Respondent contended below that it had a legal and equitable right by reason of: its payment of unpaid materialmen, its subrogation rights to the retainages, the assignment by Harman to it of contract proceeds, and the controlling law of suretyship as enunciated by the Court of last resort of Virginia. Summary judgment granted respondent surety (plaintiff below) by the trial court was affirmed by the appellate court. *Glassman Construction Co., Inc. v. The Fidelity & Casualty Company of New York*, 356 F.2d 340 (D.C. Cir. 1966).

Subsequent to oral argument on appeal the appellate court issued an order advising the parties that the relative priorities of an assignee of a claim and an off-setting obligor "may be applicable" and in such case the disposition of the claim "may turn on certain facts not appearing in the record as presently constituted." (See Order dated September 3, 1965, in Appendix C, at page 23 of the Petition herein.) The court requested the parties to submit briefs directed to the aforementioned question of priorities and also inquired of the parties whether any of the following three dates were "controverted": (1) date of the third subcontract; (2) date of Harman's default on that subcontract; (3) date Glassman received actual or constructive notice of the assignment to respondent. (Id. at 24)

The petitioner filed its "Supplemental Brief for Appellant" (part of the record herein) pursuant to the above appellate order and agreed with the court in its opening sentence as follows:

> "Appellant agrees that the principle stated in *Restatement, Contracts*, Sec. 167(1) (1932) and in *Michie's Jurisprudence of Virginia and West Vir-*

> *ginia*, 423 (1951), both of which authorities were cited in the court's per curiam order of September 3, 1965, is applicable to this case. Furthermore, appellant submits that the principle as applied here would dictate a judgment in favor of appellant."

Petitioner and respondent, in respect to the three dates noted by the appellate court, stipulated in their respective supplemental briefs that the date of the third subcontract was July 19, 1960. The stipulation also indicated to the court the date of Harman's default on the third contract (the second date referred to by the court) by quoting a letter from petitioner to Harman's surety on the third subcontract. In respect to the third date referred to by the court (when petitioner received actual or constructive notice of the assignment to respondent), the parties did not agree but submitted as part of the stipulation information regarding other correspondence.

Petitioner states at pages 5-6 of its petition that upon the filing of the supplemental briefs in accordance with the appellate order "it became evident that there *was* a serious dispute as to whether, at the time that Glassman's right to set-off arose against Harman on the third subcontract of July 19, 1960, Glassman had notice of Harman's assignment to Fidelity of the proceeds due under the two subcontracts of December 14, 1959" (i.e., the third date referred to by the appellate court).

The appellate court stated that it based its holding in the case on the following facts:

> "The facts here show that the Harman subcontracts bonded by Fidelity were entered into December 14, 1959, that Fidelity, as surety for Harman, executed the payment bonds covering the two subcontracts on the following day, December 15, 1959, that Glassman's third subcontract with Harman, not bonded by Fidelity, was entered into on July 19, 1960, and that the default on all three subcontracts occurred on November 30, 1960. These facts present for our resolution two questions: (a) when did the assignment become effective, and (b)

when did Glassman receive notice thereof." (356 F.2d 340, 342; Appendix B, at p. 19 of the Petition.)

The facts referred to in the quoted passage of the appellate decision will be found as part of the facts set forth in the Statement in Glassman's Petition herein at pages 3-4, and are *not* disputed by the parties.

In respect to the two questions posed in the above passage from the appellate decision, question (a) relating to the effective date of the assignment to the surety was resolved by a conclusion of law and petitioner Glassman does *not* take issue therewith in its petition.

The second question resolved by the court ("(b) when did Glassman receive notice thereof"), is related to the third date regarding which the appellate court inquired in its order of September 3, 1965, whether controversy existed, and is the source of petitioner's issue brought to this court.

The appellate court resolved that question as follows:

> "The issuance of the bonds was notice to Glassman of the assignment of Harman's rights to Fidelity. Virginia law required the bonds. Glassman's contracts with Harman required the bonds, Glassman received copies of the bonds at the time they were issued and indeed was an obligee thereon. Even without considering the general practice in the industry, it is clear from these facts that Glassman had notice of the assignment. However, subrogation as a matter of law resulted on the payment of the bonds, and relates back to the time of issuance; notice to Glassman, of course, is presumed therefrom." (356 F.2d 340, 343; Appendix B, at pp. 20-21 of the Petition.)

It is this conclusion which petitioner argues constitutes an improper finding of fact by the appellate court.

ARGUMENT

I.

Holding Objected to Is One of Law and Not a Finding of Fact.

Petitioner states it seeks a writ on the grounds (as set forth at page 6 of the Petition) that the following holding of the appellate court constituted "findings of fact" and "was totally unsupported by the record and was contrary to fact":

> "The issuance of the bonds was notice to Glassman of the assignment of Harman's rights to Fidelity. Virginia law required the bonds, Glassman's contracts with Harman required the bonds, Glassman received copies of the bonds at the time they were issued and indeed was an obligee thereon." (356 F.2d 340, 343; Appendix B, at pp. 20-21 of the Petition.)

Petitioner overlooks the additional sentence in the same paragraph which forms a part of the holding relating to actual or constructive notice as follows:

> "Moreover, subrogation as a matter of law resulted on the payment of the bonds, and relates back to the time of issuance; notice to Glassman, of course, is presumed therefrom." (Ibid.)

This conclusion of legal subrogation is a determination of law (and a primary legal contention below by respondent) to which petitioner has not objected.[1]

Furthermore, the portion of the holding which petitioner quotes (i.e., that issuance of the bonds constituted notice) was also a determination of law premised on a statute and undisputed fact. The court's premises included: "Virginia law required the bonds"; this clearly is a stat-

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[1] The date of issuance of the bonds, December 15, 1959, was a fact stipulated at the trial level and not disputed, and is set forth as a fact in petitioner's Statement of Facts in its petition.

utory matter. It noted that "Glassman's contracts with Harman required the bonds" and this was not a new fact, having been before the trial court and the appellate court as evidenced by paragraph 1 of "Plaintiff's Statement of Material Facts as to which there is no Genuine Issue" (p. 14 of the Consolidated Joint Appendix forming part of the record herein), and not disputed. The court stated, "Glassman received copies of the bonds at the time they were issued and indeed was an obligee thereon"; and this is not disputed, was not the subject of the inquiry by the appellate court and, in any event, is implicit from the aforesaid statutory and contractual requirements.

The facts upon which the appellate court relied in reaching its legal conclusions were explicitly stated by it as follows:

> "The facts here show that the Harman subcontracts bonded by Fidelity were entered into December 14, 1959, that Fidelity, as surety for Harman, executed the payment bonds covering the two subcontracts on the following day, December 15, 1959, that Glassman's third subcontract with Harman, not bonded by Fidelity, was entered into on July 19, 1960, and that the default on all three subcontracts occurred on November 30, 1960. These facts present for our resolution two questions: (a) when did the assignment become effective, and (b) when did Glassman receive notice thereof." (356 F.2d 340, 342; Appendix B, at p. 19 of the Petition.)

None of these facts has been disputed and indeed each is specified by petitioner itself to be part of the pertinent fact in its State at pages 3-4 of its Petition herein. Thus the appellate court reached its legal determination (that petitioner was on notice of the assignment) after applying legal principles not contested here by petitioner to facts not in dispute, namely, the existence and dates of bonds, contracts and Harman's default.

In essence, petitioner is contending that the legal conclusion from undisputed facts, that petitioner had constructive notice of the assignment prior to the existence

of its set-off, constitutes a finding of fact. But it is long established that a determination of constructive notice is a conclusion of law. 2 *Pomeroy's Equity Jurisprudence*, 5th ed., Section 604. That the appellate court inquired as to the existence of controversy over the date of notice does not convert the court's holding of constructive notice into a finding of fact.

The appellate court commented in footnote 11 on petitioner's contentions that it had no notice of the assignment but held the contention was "untenable" for the reasons" set forth in the text of the decision.

Petitioner's authorities in sections I and II of its petition relate to factual determinations by appellate courts and therefore are not apposite, there being no fact findings here. Similarly, petitioner's suggestion in section III of a conflict in circuits is not apposite.

Whether or not the legal conclusion reached by the appellate court is erroneous or valid is not an issue raised by the petition and therefore no discussion is necessary.

II.

Court of Appeals Did Not Order Production of Evidence nor Make Findings of Fact and, in Any Event, Petitioner Concurred in Procedure.

Petitioner premises its petition on the argument (as set forth in its "Question Presented") the appellate court cannot properly "order the production of evidence, weigh and consider such evidence, make findings of fact therefrom, and on the basis of such findings affirm."

The appellate court did none of these things. In its order of September 3, 1965, it requested briefing on a legal point (relative priorities) and advised the parties that disposition of the case "may turn on certain facts not appearing in the record as presently constituted." (Appendix C,

at p. 23 of the Petition.) It then noted the facts to be (1) the date of the third subcontract with Harman; (2) the date of Harman's default on the third subcontract; (3) the date when Glassman "received notice, either actual or constructive, of the assignment provisions."

The court did not ask for evidence but simply posed the following inquiry to the parties:

> "Are any of the dates referred to in (1), (2) and (3) above controverted by the parties to this appeal?" (Appendix C at p. 24 of the Petition.)

The parties then entered into a stipulation regarding these three dates, which stipulation was set forth in their respective supplemental briefs. (See as part of the record herein the Supplemental Brief for Appellant at pp. 4-7 and the Supplemental Brief for Appellee at pp. 1-4.) The parties agreed that the third subcontract was dated July 19, 1960, and they indicated the date of default on the third subcontract by quoting in its entirety a registered letter issued by petitioner Glassman to Harman's surety on the third subcontract. These dates are not contested by petitioner and indeed are relied on by it in the petition.

In respect to the third date, as to which the appellate court asked whether it was controverted by the parties, the parties did not stipulate but as petitioner states at page 5-6 of its petition, "it became evident that there *was* a serious dispute as to whether" Glassman had notice of Harman's assignment. However, the parties did submit as part of the stipulation a summary of certain additional correspondence.

Petitioner's interpretation of these events is unwarranted. The appellate court did not "order the production of evidence" and did not "make findings of fact therefrom." As noted in the prior argument the court's *factual* premises were the dates of the subcontracts, the bonds, and the default, none of which was or is in dispute.

Even if the appellate decision was based entirely on new facts, such did not involve controverted facts being weighed and decided by the appellate court nor was it an instance of an untried issue of fact being arbitrarily resolved by the court. Rather, in response to an inquiry by the court whether certain facts were controverted, the parties stipulated gratuitously to the extent they could as to certain dates.

Petitioner did not object to the procedure until it received an unfavorable decision. This was too late. An appellant should not be heard to argue improper procedure below when the impropriety consists of its own submission of stipulated facts, which stipulation it continues to recognize as accurate.

If the essence of petitioner's objection is that it did not have *actual* notice of the assignment and the appellate court could not resolve this question because such would constitute a finding of fact, then its position is still not sound. The appellate court did not determine when petitioner had *actual* notice and such is immaterial. The court held that petitioner was presumed as a matter of law to have notice of the assignment on the basis of the subcontracts, the bonds, and the Virginia statute. As noted above, these particular matters involved no disputes of fact whatsoever, and, indeed, petitioner does not contend otherwise.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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400 Union Trust Building
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Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for Respondent in Opposition were hand carried and delivered to Leonard S. Melrod, 815 Connecticut Avenue, N. W., Washington, D. C., counsel for petitioner, this 27th day of May, 1966.

Thomas H. McGrail